EPA-HQ-OPP-2018-0805 Center for Food Safety Seed Treatment Petition

This is a compilation of all comments in order to save time and space. In addition to comments over a hundred publications were entered into the docket, often with no explanation of their relevance to the issue. The comments from USDA are presented first, almost in their entirety, due to their unique and technical nature. Next are portions of laws that were cited often, a request, and then points raised in comments:

The petitioners do not have a valid claim. USDA is unable to locate any case that supports the petitioners' false notion that seeds should be differentiated from plants. However, in a prior 2016 lawsuit initiated by many of the same petitioners submitting the petition at hand (Anderson v. McCarthy, No. C 16-00068 WHA, 2016 WL 6834215 (N.D. Cal. Nov. 21, 2016)—it was alleged that EPA failed to protect pollinators by authorities it has under FIFRA. The purported failure stems from 2013 guidance the agency issued that allows pesticide-treated seeds to be exempt from regulation as pesticides. The guidance allows the use of treated seeds (which in this case the concern is seed coated with neonicotinoids), i.e., on page 7 of the guidance:

> "[t]reated seed (and any resulting dust-off from treated seed) may be exempted from registration under FIFRA as a treated article and as such its planting is not considered a "pesticide use." [40 C.F.R. § 152.25(a)]. However, if the inspector suspects or has reason to believe a treated seed is subject to registration (i.e., the seed is not in compliance with the treated article exemption), plantings of that treated seed may nonetheless be investigated. (See the FIFRA Inspection Manual for further considerations.)"

The federal district court ruled that the language from EPA's guidance is not subject to legal review as it is not a final notice. The following outlines further germane sections from Anderson:

In Anderson, the Petitioners emphasized a footnote in Heckler v. Chaney, 470 U.S. 821 (1985). Anderson, 2016 WL 6834215, at 10. The Heckler decision, which applied 5 U.S. Section 701(a)(2), held that in situations where an agency "refus[es] to take enforcement steps...the presumption is that judicial review is not available" because "an agency's decision not to prosecute or enforce...is a decision generally committed to an agency's absolute discretion." Id. The exception to this general rule—i.e., the "Heckler exception" plaintiffs rely on—is in a footnote to the aforementioned analysis, wherein Heckler stated the Court "express[ed] no opinion" on whether an agency's decision to "consciously and expressly adopt [ ] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" would similarly be "unreviewable under § 701(a)(2)." Id.

Anderson found the Petitioner's argument to had a fundamental flaw. That is, the "Heckler exception" requires an agency decision to "consciously and expressly" adopt a general policy. Id. at 11. Anderson found that EPA's 2013 Guidance expressly contemplated potential enforcement of FIFRA requirements as to pesticide-treated seeds. Id. Anderson found that the 2013 Guidance directly contradicted plaintiffs' allegations of a "policy of non-enforcement" and "abdication of duties." Id. Anderson, further noted that "even assuming for the sake of argument that a blanket-exemption policy as to pesticide-treated seeds would constitute an abdication of the EPA's responsibilities under FIFRA as to such seeds, there is no

basis for finding the EPA 'consciously and expressly adopted a general policy' abdicating its statutory responsibilities here." Id.

Most importantly, the Petitioners lost their motion to compel "completion and supplementation" of the administrative record and to conduct limited discovery. Id. at 12. Because of a prior order, the EPA submitted under seal for in camera review "documents that relate to the development of the guidance that are not a part of the administrative record, including pre-decisional and deliberative documents." Id. The court found nothing that would weigh in plaintiffs' favor on the issue of "whether the agency should proceed by guidance versus some other procedure" or "whether the guidance would constitute final agency action." Id. Nor did any document submitted for in camera review support application of the "Heckler exception" to this case. Id.

Based on the current Petition and the Anderson case, it is USDA's opinion that this Petition is a roundabout manner to compel the EPA to supplement the administrative record in advance the Petitioner's next attempt to file a lawsuit concerning treated seeds.

Further, interpretations of this assumed exemption are embodied in other EPA regulations. For example, the Pesticide Registration (PR) Notice 2000-1, pertaining to the Applicability of the Treated Articles Exemption to Antimicrobial Pesticides, clarifies that "section 152.25(a) provides an exemption from all requirements of FIFRA for qualifying articles of or substances treated with, or containing a pesticide, if: (1) the incorporated pesticide is registered for use in or on the article or substance, and; (2) the sole purpose of the treatment is to protect the article or substance itself." Although this PR Notice applies to antimicrobials, the interpretation should

hold for conventional pesticides as well. Another example can be found in 40 CFR, § 174.3., which for the purposes of Plant-Incorporated Protectants defines a plant as, "for plant-incorporated protectants, means an organism classified using the 5-kingdom classification system of Whittaker in the kingdom Plantae. This includes, but is not limited to, bryophytes such as mosses, pteridophytes such as ferns, gymnosperms such as conifers, and angiosperms such as most major crop plants." Note that a Plant-Incorporated Protectant is defined as a "pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for production of such a pesticidal substance. It also includes any inert ingredient contained in the plant, or produce thereof." From these definitions, it is gathered that EPA considers seeds to be plants and it is USDA's opinion that EPA should be given the authority to continued regulating treated seeds as such.

40 CFR §*152.25 Exemptions for pesticides of a character not requiring FIFRA regulation*.

(a) Treated articles or substances. An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.

The treated article exemption as written provides two examples, both of which are inanimate. This is consistent with other EPA guidance which also gives inanimate examples. The seed is not an inert article, rather it is a living article that transforms itself through biological processes. This means that the

use of systemic pesticides on seeds does not protect only the article itself, it offers protection to the subsequent plant.

We ask that the EPA review the long-standing authority (1940, revised 1998) of USDA's jurisdiction under the Federal Seed Act (FSA, 7 U.S.C. 1551-1611). Within Title I of FSA, Congress included the term "treated" defined as follows:

Title I, Sec. 101,

(23) The term "treated" means given an application of a substance or subjected to a process designed to reduce, control, or repel disease organisms, insects or other pests which attack seeds or seedling growing therefrom.

Under the Federal Seed Act jurisdiction, a treated viable seed or seedling after the cotyledons emerge clearly meets the stated definition of "treated" under Title 1, Sec. 101 (23).

We also believe that the FSA Congressional language supports EPA's use of the treated article exemption. Similarly, the Plant Protection Act (PPA, 7 U.S.C. 7702) includes the supporting definitions:

7 U.S.C. §7702. Definitions

(13) Plant
The term "plant" means any plant (including any plant part) for or capable of propagation, including a tree, a tissue culture, a plantlet culture, pollen, a shrub, a vine, a cutting, a graft, a scion, a bud, a bulb, a root, and a seed.
(14) Plant pest
The term "plant pest" means any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product:
(A) A protozoan.
(B) A nonhuman animal.
(C) A parasitic plant.
(D) A bacterium.
(E) A fungus.
(F) A virus or viroid.
(G) An infectious agent or other pathogen.
(H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs.

Florida Fruit and Vegetable Association and an American Beekeeping Federation Member requests the EPA either initiate a rulemaking or issue a formal Agency interpretation for planted seeds treated with systemic crop protection chemicals.

The petitioners claim harm, but nothing is offered or documented.

The Treated Article Exemption itself must be questioned for its loophole role in facilitating unlawful under-regulation of materials with clearly demonstrated and advertised pesticidal properties. Requiring registration and labeling of seeds treated with pesticides would allow for oversight and enforceable labels. Bags of treated seed are tagged with treatment information and restriction. Treated seeds are marketed as pesticides and must be regulated as pesticides. The assumption that seed treatments

applied in the seed processing and packaging facility has no undesirable effect in the field environment is false. By only registering the chemical and not the treated seed, the EPA ignores the harmful impacts of these seeds to the environment. Please regulate seeds treated with pesticides. Pesticide coated seeds are a pesticide application. EPA has failed to adequately assess clothianidin and thiomethoxam, therefore the treated article exemption cannot apply to seeds treated with these chemicals, or any other chemical for which EPA has not examined pollinator risks and 'dust off'.

The EPA already requires FIFRA review and safety standards for these products.

This issue effects much more than bees and should be a greatest environmental concern. Neonicotinoids used by farmers are one of the greatest threats to aquatic and terrestrial ecosystems. A single neonicotinoid treated seed can fatally poison a bird. Chemicals from treated seeds contaminate nearby soil, plants, and water. Seed treatments, as dust, are distributed by the wind. Systemic insecticides incorporate into the plant and are effective against insects regardless of pest or pollinator status.

Hundreds of studies conducted on the neonicotinoids and bees indicate that when used according to label instructions they are not harmful to bees. Growers and industry have invested significantly in developing improved seed treatment technologies and BMP's to limit bee exposures.

The four largest agrochemical companies control over 60% of the seed market which makes it harder for farmers to avoid treated seeds. Neonicotinoid treated seeds are planted ubiquitously (e.g. 95% of all corn acreage).

Seed treatment benefits: yield increases, use less inputs, precise application protecting seeds, control of below-ground pests, lower application rates. Seed treatments are vital to canola, corn (over 95% of US corn seed planted), cotton, grain sorghum, peanut, rice, soybean, sunflower, and wheat growers, Louisiana agriculture, Minnesota agriculture, Oklahoma farmlands, south Texas crop production, Virginia Agribusiness producers, the sugar beet industry, and US agriculture. In reality, the main benefit of is to protect the cotyledons which are technically part of the seed.

Studies indicate neonicotinoid seed treatments provide little to no benefit to farmers. (example: EPA-HQ-OPP-2014-0737-0002)

Approval of this petition will put a tremendous paperwork and bureaucratic burden on growers and will duplicate EPA's existing exercise of its authority. Petitioners' request is akin to having a regulatory approval process for automobile tires, and then requiring a second identical review process for the same tires once they are mounted on a vehicle. Such a move would increase costs and potential liability within the seed industry and to the farm without ANY benefit to the environment or public health and will cost the consumer money.

Approval of this petition may lead to a return to older, less efficacious methods of protecting crops or to more broadcast applications of pesticides leading to other environmental issues. Neonics have replaced OP's for protecting seed in addition to protecting the seedling plant after germination.

Approval of this petition will make it more difficult to tailor seed treatments to local needs.

Ban neonicotinoids now. The EPA must do its job and ban neonicotinoid insecticides in the United States. Please protect pollinators and humans by banning neonicotinoid treated seeds.

I am strongly in favor of regulations that restrict the use of insecticides that endanger bee species. Bees pollinate over 1/3 of our food. Bees are going extinct largely due to neonicotinoid use.

Nobody should be eating these seeds. As a consumer, I should be given the option to know before buying a product whether or not it has been treated with an insecticide. The Citizens of America are being killed by the high concentrations of toxic chemicals allowed in the food we eat. Life spans are declining. We are being poisoned to death. Cancer is rampant. These chemicals are being found in human urine.

It is time we start protecting the environment and stop allowing its systematic destruction.

"If we don't regulate pesticide coated seeds, errors like the Scott company selling these seeds to feed birds will happen more frequently"

"just because you guys in govt get big payoffs from toxic chemical profiteers -well if that is happening you should be fired from your job"